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No. 95-6510

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J.D. NETHERLAND,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

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58 pp

QUESTIONS PRESENTED

I.

WHETHER THE COMMONWEALTH'S DISINFORMATION REGARDING DETERMINATIVE SENTENCING ISSUES VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

II.

WHETHER THE COMMONWEALTH'S SUPPRESSION OF EXCULPATORY, MATERIAL INFORMATION SHOWING THAT SOMEONE OTHER THAN PETITIONER COMMITTED THE UNADJUDICATED HOMICIDES RELIED UPON BY THE COMMONWEALTH AT THE SENTENCING PHASE OF PETITIONER'S TRIAL VIOLATED THE CONSTITUTIONAL RULES REFLECTED IN *BRADY V. MARYLAND*?

III.

WHETHER INVOKING WELL-ESTABLISHED DUE PROCESS PRINCIPLES PROHIBITING STATE ACTION WHICH AFFIRMATIVELY MISLEADS A DEFENDANT REGARDING THE DETERMINATIVE ISSUES IN HIS CASE CREATES A NEW CONSTITUTIONAL RULE?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995), and is set forth in the Joint Appendix at 354-75. The opinion of the United States District Court for the Eastern District of Virginia is unreported and is set forth in the Joint Appendix at 335-53. The opinion of the Virginia Supreme Court on direct appeal is reported as *Gray v. Commonwealth*, 356 S.E.2d 157 (Va. 1987), *cert. denied*, 484 U.S. 873 (1987), and is set forth in the Joint Appendix at 57-109.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1995. Rehearing was denied on July 25, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

The writ of habeas corpus was granted by the district court because the prosecution "ambushed" Petitioner's counsel at capital sentencing regarding the pertinent issue it would present about a notorious unadjudicated double homicide, and

because the prosecution's disinformation regarding the crippling sentencing issue denied Petitioner a meaningful opportunity to expose the truth. *Gray v. Thompson*, No. 3:91CV693, slip op. at 13-15 (E.D. Va. August 25, 1994); J.A. 348-51.[1] In fact, at every turn the Commonwealth thwarted Petitioner's ability to obtain a reliable sentencing determination. Not only did the trial court deny defense requests for investigative and expert services, but also the prosecution both deliberately misled Petitioner's trial counsel about a determinative sentencing issue and withheld material, exculpatory information which would have completely undermined the evidence it did present. The district court correctly determined that "Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the due process clause of the Fourteenth Amendment of the United States Constitution." *Id.* at 17; J.A. 352.

Petitioner was convicted of the murder of Richard McClelland. On May 2, 1985, police found McClelland's body in a rural area of Suffolk, Virginia. He had been shot six times in the head at close range with a .32 caliber weapon. His partially burned automobile was found several miles away. Petitioner and Melvin Tucker were both charged with capital murder. The district court noted that "[p]erhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder." J.A. 339. For example, Petitioner admitted to police his own involvement in the McClelland abduction, but emotionally insisted both that " 'the man wasn't supposed to die' " and that "Melvin Tucker was the person who shot McClelland." *Gray v. Commonwealth*, 356 S.E.2d 157, 162 (Va. 1987); J.A. 63-64. Tucker said that Petitioner shot the victim. Commonwealth's Attorney C. Phillips Ferguson entered into a

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[1] References to the Joint Appendix will be designated "J.A.". References to the pre-trial, trial and sentencing record will be designated "R.".

plea bargain with Tucker: in exchange for Tucker's testimony, the Commonwealth agreed not to seek the death penalty against him. *Gray v. Thompson*, No. 3:91CV673, slip op. at 4-5; J.A. 339. Based on Tucker's testimony, and testimony from several other jailhouse informants, the jury convicted Petitioner of McClelland's murder.[2]

A separate, double homicide – "one of the most highly publicized crimes in the history of the Tidewater, Virginia area," *id.* at 6 (J.A. 341) – occurred in neighboring Chesapeake, Virginia, five months before the McClelland crime. Lisa Sorrell was found dead in her partially burned automobile. She had been shot six times in the head at close range with a .32 caliber firearm. Her three-year-old daughter, Shanta, was found in the trunk of the car, dead from carbon monoxide poisoning as a result of the fire.

The day the McClelland trial began, Ferguson told the trial court and defense counsel that if Petitioner was convicted of McClelland's murder he planned at sentencing to

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[2] Three other prison inmates also testified against Petitioner, saying that he had, in varying degrees, confessed to them that he had killed McClelland. "The Commonwealth relied in large measure upon the testimony of Tucker and the other three prison inmates to establish that Gray actually perpetrated McClelland's murder." *Gray*, 356 S.E.2d at 174; J.A. 95.

Two inmates testified that Petitioner admitted tying up McClelland and shooting him. R. 727, 862. In fact, McClelland had not been bound before he was shot, although television and newspaper accounts reported that he had been. R. 740, 1241. A third inmate testified that he heard Petitioner admit to another inmate, Carl Bond, that Petitioner was the triggerman in McClelland's murder. R. 841-49. Defense counsel learned of Bond only through this testimony during trial. Counsel subsequently subpoenaed Bond, who testified that he had been incarcerated next to Petitioner but that Petitioner had always maintained that Tucker was the triggerman. R. 904. Bond also testified that he had told "a member of the Suffolk law enforcement agency" several weeks earlier that Petitioner had only professed that he was *not* the triggerman. R. 911. The Commonwealth knew, but did not tell the defense, that Bond would contradict their jailhouse snitch witness. R. 913-17.

introduce inmate testimony that Petitioner had said he killed the Sorrells. Ferguson pledged and promised that he would introduce no other evidence about the Sorrell murders – only Petitioner's alleged statements to inmates would be at issue. *Id.* at 6; J.A. 341. Tucker, it turns out, was the inmate the Commonwealth planned to present.

On the day of the sentencing trial, however, Ferguson advised the trial court that he would introduce other evidence in support of his effort to prove that Petitioner committed the Sorrell murders, including medical examiner testimony, autopsy photographs of the victims, and police officer M.I. Slezak's testimony about the circumstances of the murders. Defense counsel "clearly and justifiably were shocked" by Ferguson's "tactics," *id.* at 14, 15, 17 (J.A. 350, 352), but "[d]espite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders." *Id.* at 8; J.A. 343. The district court found that Ferguson's decided tactic was to withhold the fact that he would introduce this evidence so as to "surprise Mr. Gray's attorneys." *Id.* at 13; J.A. 348.

The surprise was devastating:

> Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. . . . [T]he evidence of the police officer [Slezak] and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like McClelland's, was burned after the murder. Thus, the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.

Gray, 356 S.E.2d at 176; J.A. 98-99.

In addition to being untruthful about the issues to be litigated at sentencing, Ferguson did not disclose an entirely different and exculpatory issue: that, until the Commonwealth turned its attention to Gray, Timothy Sorrell, Lisa Sorrell's husband, was the Commonwealth's only serious suspect in her death. Unknown to the defense but well known to Officer

Slezak, Timothy Sorrell had several motives and the opportunity to kill his wife, and no alibi. In addition, substantial evidence pointed to Timothy Sorrell's guilt, including statements he had made to others shortly before the murder that he wanted his wife killed. *See* Statement of the Case, sub-section J.2.b., *infra*. In fact, Slezak had approached the Chesapeake Commonwealth's Attorney seeking to indict Timothy Sorrell for the murders. *See id.*

The district court granted habeas corpus relief because Commonwealth's Attorney Ferguson's tactics, and their consequences, undermined confidence in the result of the sentencing proceeding. Ferguson "ambushed" counsel with police officer and medical examiner testimony and did not provide a meaningful opportunity for Petitioner to expose the truth. *Gray*, No. 3:91CV693, slip op. at 15; J.A. 351. With Slezak's withheld Timothy Sorrell evidence, Petitioner would have been able to show that Tucker – the Commonwealth's pivotal guilt/innocence and sentencing witness – was utterly unbelievable.[3] "Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the due process clause of the Fourteenth Amendment of the United States Constitution," *id.* at 17; J.A. 352, and the district court's order granting relief should be reinstated.

A. Pre-trial McClelland Hearings: No Defense Investigator and Commonwealth's Attorney Ferguson Vowed to Provide *Brady* Material.

The trial court appointed James A. Moore and Carl E. Eason to represent Petitioner. R. 15-16. Defense counsel sought the assistance of an investigator. At Prosecutor Ferguson's urging, the trial judge denied the request. R. 70. Counsel also sought all exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Ferguson stated, "We

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[3] "Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders." *Id.* at 16; J.A. 352.

are certainly willing to give defense counsel whatever he's entitled to as it relates to . . . the *Brady* case." R. 73.

B. On the First Day of Trial, Ferguson Announced that He Would Present Inmate Testimony that Petitioner Had Confessed to a Double Homicide – the Sorrell Crime – for Which Petitioner Had Not Been Charged; Ferguson Pledged Not to Introduce Any Other Evidence Regarding Sorrell.

At an in-chambers hearing immediately before Petitioner's guilt-or-innocence trial began on December 2, 1985, defense counsel asked the court to direct Ferguson to disclose the issues that he would raise at sentencing if Petitioner were convicted. R. 280. Specifically, counsel asked whether the Commonwealth intended to put at issue who had committed the Sorrell murders. *Id.* Ferguson responded that Petitioner's purported statements to other inmates about the Sorrell crime and about a murder in California would be at issue at sentencing. R. 281. The following discussion ensued:

> MR. MOORE: Is it going to be evidence or just his statements?
>
> MR. FERGUSON: Statements that your client made.
>
> MR. MOORE: Nothing other than statements?
>
> MR. FERGUSON: To other people; that's correct. Statements by your client that he did these things.

R. 282.

C. After Conviction and Immediately Before Sentencing, Ferguson Switched the Sorrell Issue from Alleged Confessions to Modus Operandi.

The jury found Petitioner guilty late in the afternoon of Thursday, December 5, 1985. The next morning, again at an in-chambers hearing, defense counsel advised the court that "the Commonwealth has admitted, has given us the suggestion that he intends to put evidence on of the photographs of the victims of [the Sorrell] murder as well as other evidence

of that murder." R. 996. Defense counsel stated that they received notice of this the previous night, when

> for the first time [the Commonwealth's Attorney] made known to us . . . that he intends basically to put on evidence to try or go a long ways in trying another murder. This is the first time that Mr. Eason and I heard that he would do anything other than put on inmates' statements, supposed inmates' statements, that our Mr. Gray had made to fellow inmates that he killed the Sorrells. . . . [W]e were prepared for that, argumentatively and evidentiary-wise. However, we are not prepared to rebut, put on any rebuttal evidence because of the shortness of notice. We are not prepared to try the Sorrell murder today. We have not been given sufficient notice.

R. 997-98; *see also* R. 1000 ("We are not prepared for any of this, other than he may have made some incriminating statements.") The court ruled that the Commonwealth could pursue these new issues. R. 1001.

At sentencing, Ferguson introduced the testimony of an inmate who said that Petitioner told him in jail that he had been involved in a California murder. R. 1036.[4] Then Tucker testified. He stated that while he and Petitioner were looking through a newspaper at Petitioner's apartment after the

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[4] The Commonwealth introduced no other evidence about Petitioner's supposed connection to this murder. Petitioner testified that he was not guilty of the California murder and that he had been tried and found not guilty. R. 1138-39. A later presentence report confirmed that Petitioner was acquitted of the California murder by a jury. R. 1527. Indeed, at the January 27, 1986 presentence hearing before the trial court judge, Ferguson, who had argued to the jury that this allegation further demonstrated Gray's future dangerousness, noted that "[o]f course, [Petitioner] was acquitted of the [California murder] so I'm not sure whether it makes a whole lot of difference" with respect to sentencing. R. 1587.

McClelland crime, they saw an article about the Sorrell murders and Petitioner said that he had "knocked off" Lisa Sorrell. J.A. 22-23.[5] No other evidence connected Petitioner to the Sorrell crime.

After Tucker's testimony, defense counsel renewed the motion to exclude further evidence about the Sorrell murders:

> And as I have tried to argue to the Court earlier in this trial today, we have had no notice of this, *short of the last twenty-four hours we have had notice of it*. Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge. . . . *[The d]efense was taken by surprise*. And the jump from Mr. Gray's statement to the co-defendant – and that's all we have here, the co-defendant's admission, who we know has made an agreement with the Commonwealth. The Commonwealth wants to get from Melvin Tucker to the photographs of the Sorrells. *It's too great a jump, too broad a jump*. . . .

J.A. 25-26 (emphasis added).

Ferguson replied that defense counsel knew that the Sorrell murders would be at issue, but acknowledged that he had said that this aspect of the hearing would only involve whether "this defendant has confessed to other crimes involving murder specifically the Sorrell murder." J.A. 26. Ferguson argued that testimony and evidence about the Sorrell homicides beyond Tucker's testimony was critical because "this evidence goes to the whole thrust of what the Commonwealth must prove in a sentencing hearing" vis-a-vis "future dangerousness." J.A. 26-27.

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[5] Tucker did not report Petitioner's alleged statement to law enforcement authorities until Slezak, the chief investigating officer in the Sorrell case, urged Tucker's lawyer to ask Tucker whether Petitioner had made any statements regarding the Sorrell murders. J.A. 206-08. Only after this prompting, which occurred shortly before trial, did Tucker "remember" Gray's alleged remark.

Defense counsel countered:

> MR. MOORE: [T]he Commonwealth . . . has stated that he made this available to us at the beginning of the trial. That is not true. He said that he was going to bring in statements that our man had confessed, that Gray had confessed to other people. That is true. We were aware of that. We were prepared for that.
>
> But, what he is going to do today is not what he said he was going to do at the beginning of trial. He said he was going to bring in evidence that he, that Gray, had confessed to other people.
>
> My point is that we were ready for that. That's alright. But now, within the last few hours we learn that not only is he going to get that in, which we were prepared for, he's going to put on photographs of people, which we're not prepared for, and goes beyond that. So, if he's going to mislead anybody as to what we were told, I want to clear the record up for that right now. We were not told this was coming in.
>
> THE COURT: Well, gentlemen, you were aware of it yesterday.
>
> MR. MOORE: Yes, sir. That's too short a time to be prepared for it.

J.A. 27-28.

D. Contrary to What Defense Counsel Had Been Promised, Ferguson Was Allowed to Litigate the Issue of Whether the Uncharged Sorrell Crime Was "Identical" to the McClelland Crime.

Tucker was the nexus between Petitioner and the Sorrell homicides. On this thin reed, and contrary to what the Commonwealth had promised would be the issue (*i.e.*, Tucker's credibility), the trial court allowed Ferguson to introduce all of the forensic evidence gathered by the Chesapeake Police

Department regarding the Sorrell murders. The Commonwealth then argued a new issue: that the *modus operandi* of the Sorrell killing was the same as the McClelland killing.

First, the Commonwealth called Officer Slezak, who had investigated the Sorrell murders. Slezak testified that he found Lisa and Shanta Sorrell in a burned and abandoned automobile in Chesapeake, Virginia. The car was blackened by smoke and Lisa Sorrell was dead in the front passenger area; Shanta was found dead in the trunk. J.A. 29-30. Through Slezak, the Commonwealth introduced photographs of the burned interior of the car with Lisa Sorrell's body, Shanta Sorrell in the trunk, Lisa Sorrell's body after it was removed from the automobile, and Lisa's and Shanta's bodies during autopsies.[6]

Dr. Faruk Presswalla, the state medical examiner who performed the Sorrell autopsies, also testified. He stated that Shanta, "a baby, three years old," died of carbon monoxide poisoning caused by a fire. J.A. 42. He described in great detail the six gunshot wounds to the back of Lisa Sorrell's head. J.A. 44-45, 47. He also displayed an autopsy photograph other than the ones introduced through Slezak.

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[6] The Commonwealth introduced photographs of McClelland's burned automobile and the bullet wounds to the back of his head during the guilt/innocence proceedings. *See* Exhibits 3, 6, 14A-D, 15A-B, 16-17 and 37-41. The Commonwealth introduced parallel evidence about the Sorrell crime. Exhibit 46 showed the driver's side of the Sorrell car, with an empty baby seat. Exhibit 48 was a 5x7 color photograph of Lisa Sorrell's body at the crime scene, showing fire damage to the vehicle. Exhibit 50 was a 5x7 color photograph of Shanta Sorrell's body in the trunk of the car. Exhibit 51 was a 3x5 color autopsy photograph of Lisa Sorrell, showing her upper body and face. Exhibit 52 was a 3x5 color autopsy photograph of Shanta Sorrell. Exhibit 53 was a 3x5 color autopsy photo of Shanta Sorrell. Exhibit 55 was a close-up, 5x5 color autopsy photograph of Lisa Sorrell with a portion of her head shaved to show five gunshot wounds.

E. Petitioner Testified that He Participated in the McClelland Crime but Swore that Tucker Had Killed the Victim; Petitioner Denied that He Had Any Connection to the Sorrell Homicides.

After the Commonwealth rested,[7] Petitioner testified that he participated in the McClelland murder. He took responsibility for what he had done, but insisted that he was not the triggerman in McClelland's murder. R. 1138. He stated that Tucker had assured him that the victim would not be harmed but that Tucker then shot McClelland while Petitioner remained in his car. R. 1145-46. Petitioner flatly denied any involvement in the Sorrell murders. R. 1138.

F. The Commonwealth Argued that Petitioner Should Be Sentenced to Death Based Upon Identical Twin Homicides – McClelland and Sorrell.

In closing argument, Ferguson argued that the circumstances of the Sorrell killings matched the signature of the McClelland killing and because the jury had convicted Petitioner of one of the murders, Petitioner was also guilty of the other. Ferguson recounted Tucker's and Slezak's testimony, noted that the Sorrell automobile was set on fire "just like the one in the Richard McClelland case," and argued that "the method of execution" of Lisa Sorrell was "identical to the Richard McClelland case." J.A. 51. He characterized the crimes as "brutal *systematic* execution-style crimes." J.A. 52 (emphasis added). He said that Petitioner "committed murder after murder, many in the same style, and he's done it to Richard McClelland, he's done it to a man in California, he did it to Lisa Sorrell, and he even did it to Shanta Sorrell, the little daughter." J.A. 53.

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[7] The Commonwealth introduced additional evidence in aggravation, the hallmark of which was inmate testimony that Petitioner had confessed to various crimes.

G. The Virginia Supreme Court Affirmed Petitioner's Death Sentence Based upon the Signature Crime Issue.

In its Brief to the Virginia Supreme Court, the Commonwealth argued that the "signature crime" issue justified affirming Petitioner's death sentence:

> [E]vidence concerning the Sorrell murder revealed that Mrs. Sorrell was also killed by six gunshot wounds to the head. The vehicle in which Mrs. Sorrell's body was found had been burned, and her three-year old daughter, Shanta, was found in the trunk.
>
> . . . .
>
> As defendant would undoubtedly agree, testimony from Melvin Tucker, standing alone, may not have been sufficient to convince the jury that the defendant committed the Sorrell murders[8]. . . . In combination, the forensic evidence, photographs, and the investigating officer's testimony revealed that the Sorrell murders were accomplished in a manner *very similar* to the McClelland murder. . . . Such *evidence of similarities* corroborated Tucker's report of the defendant's admission. Information about the particulars of the crime was also relevant and highly probative of the defendant's propensity to commit violent acts in the future.

Brief of Appellee at 10-11, 14 (emphasis added) (citation omitted); *see also id.* at 60 ("[T]his Court should also note that defendant's perpetration of the Sorrell murders is *particularly indicative* of future dangerousness. The execution-style killing of Lisa Sorrell was *remarkably similar* to the killing of McClelland.") (emphasis added).

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[8] The Commonwealth conceded that "Melvin Tucker was subjected to extensive impeachment." Brief of Appellee at 38.

The Virginia Supreme Court relied heavily on Slezak's and Presswalla's testimony and accompanying exhibits to affirm Petitioner's death sentence. Tucker was the only connection between Petitioner and the Sorrell crime and the linchpin of the Commonwealth's guilt/innocence case that Petitioner shot McClelland. According to the Virginia Supreme Court, Slezak's and Presswalla's testimony corroborated Tucker's vulnerable testimony by showing that the "Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder." J.A. 98.

H. The Commonwealth Successfully Argued in State Habeas Corpus Proceedings that the Sorrell Claim Had Been Decided on Direct Appeal and that, In Any Event, Based upon the Virginia Supreme Court's Interpretation of *Zant v. Stephens*, Any Error in the Admission of Sorrell Testimony Could Not Affect Petitioner's Sentence.

Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court for the City of Suffolk on July 7, 1988. In Claim IX, he alleged that the "Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use." Habeas Petition at 39. Petitioner requested an evidentiary hearing. *Id.* at 63.

The Commonwealth argued that Claim IX was not reviewable because it had been "raised at trial and on direct appeal to the Supreme Court of Virginia." Brief in Support of Motion to Dismiss at 7; *see also* State Habeas Hearing at 5, 13. The issue was thus "settled," and the prior treatment of the claim "conclusive." *Id.*[9] Respondent also argued that the

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[9] The Commonwealth conceded that Petitioner had earlier properly raised the issue: "[O]bjection was made [at trial] to the introduction of much of the evidence regarding the Sorrell murders based upon claimed short notice and insufficient time to prepare." Brief in Support of Motion to Dismiss at 20.

Petition should be dismissed without a hearing because "a valid aggravating circumstance remains, even if the future dangerousness predicate is disregarded. *Zant v. Stephens*, 462 U.S. 862 (1983); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985)." Brief in Support of Motion to Dismiss at 19; *see also* State Habeas Hearing at 44-45.[10]

At the August 22, 1989, state habeas corpus hearing, Petitioner argued that the issue of the "introduction of the testimony and the evidence concerning the Sorrell murders in Chesapeake . . . require[s] further evidence" to "establish the fact that [it] did likely have an effect on the jury." J.A. 114-15. Nevertheless, on April 12, 1990, the habeas court denied the Petition, expressly "adopt[ing] the argument presented by the respondent" on Claim IX. Order at 2.

Petitioner appealed, contending that the habeas corpus court erred in dismissing Claim IX as "procedurally barred by prior adjudication at trial and on direct appeal." Petition for Appeal at 4. The Commonwealth responded that the claim properly had been rejected on direct appeal. Brief in Opposition to Petition for Appeal at 16-17, 21. On November 1, 1990, the Virginia Supreme Court entered an order stating that "upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of." Order at 1.[11]

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[10] This Court unanimously rejected the Commonwealth's interpretation of *Zant v. Stephens* in *Tuggle v. Netherland*, 116 S. Ct. 283 (1995).

[11] The Commonwealth moved for rehearing, warning the Virginia Supreme Court that it had ruled on the merits but that the words "denied for reasons of procedural default" would "foreclose federal habeas corpus review" and thus "promote a speedy and efficient end to litigation." Motion for Rehearing at 2. The Virginia Supreme Court granted rehearing and, like the circuit court, denied relief on Claim IX because it had been raised on direct appeal. J.A. 126. Petitioner filed a rehearing petition arguing that the rehearing motion filed by the Commonwealth was not provided for in the Rules of Court, which the Virginia Supreme Court denied.

I. The Habeas Corpus Petition Filed Below and Respondent's Continued Refusal to Disclose.

In his petition for writ of habeas corpus filed in the federal district court, Petitioner alleged that:

> The Commonwealth did not disclose its intentions to use the Sorrell murders as evidence against Gray until such a late date that it was impossible for Gray's defense counsel reasonably to prepare or defend against such evidence at trial. Because of the late notice, coupled with the trial court's refusal to make funds available for a private investigator, Gray could not adequately prepare to defend his innocence regarding the Sorrell murders. . . . At the time of Gray's trial the Chesapeake police had Timothy Sorrell, the husband of Lisa Sorrell, under investigation for these murders. Although the police had reasons to believe that persons other than Gray committed the murders, this exculpatory evidence was never released to Gray.

Petition for Writ of Habeas Corpus, Ground A at 21, 22. Petitioner moved for discovery concerning the investigation of the Sorrell murders.[12]

The Commonwealth opposed the discovery request, contending that it was not sufficiently specific. Brief in Support of Respondent's Opposition to Petitioner's Motion for

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[12] Petitioner asked for the Commonwealth to identify: 1) all persons with any knowledge regarding the investigation of the Sorrell murders; 2) all persons investigated by the Chesapeake police for the Sorrell murders; 3) all persons arrested, indicted or convicted for the Sorrell murders; 4) all persons interviewed, questioned or interrogated regarding the Sorrell murders, including but not limited to, all suspects, witnesses or investigators; and 5) all reports, documents or summaries prepared by or for the Commonwealth or its counties or cities regarding the Sorrell murders.

Discovery at 5.[13] Having thereby failed to provide *Brady* material, upon a direct request, for at least the second time – the first being at trial – the Commonwealth alleged that Petitioner should have obtained and presented in state post-conviction proceedings the very information the Commonwealth continued to withhold. Brief in Support of Respondent's Opposition to Petitioner's Motion for Discovery at 2. The upshot of the Commonwealth's successful secrecy, Respondent contended, was that Petitioner had "defaulted" the so-called *Brady* aspect of the Sorrell issue.

Petitioner pointed out that he had raised at trial, on appeal, and in state habeas corpus proceedings the "denial of Gray's constitutional rights . . . resulting from the Commonwealth's introduction at the sentencing phase of his trial of evidence purporting to show that Gray committed . . . the Sorrell murders." Memorandum in Response to Respondent's Opposition to Petitioner's Motion for Discovery at 2. Petitioner argued that the evidence sought through federal discovery was "germane to Gray's general constitutional attack on the Sorrell evidence." *Id.* Petitioner further noted that *Brady had* been raised in state court when, pre-trial, Petitioner requested *Brady* material and the Commonwealth promised to provide it. *Id.* at 5. Petitioner also detailed how Slezak and Lisa Sorrell's parents had refused to cooperate with, or even speak with, Petitioner's counsel. *Id.* at 8-9.

Petitioner sought appointment of an investigator in federal court "[b]ecause Gray's counsel had no notice from the Commonwealth that it intended to introduce [Sorrell] evidence at trial [and] Gray was effectively denied any ability to interview witnesses, investigate the Sorrell murders and prepare a defense on behalf of Gray for presentation at the sentencing phase." Memorandum in Support of Motion for Appointment of Expert Assistance at 4. The Commonwealth

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[13] The Commonwealth also argued that it had a "compelling interest" in not disclosing whether the Commonwealth had considered Timothy Sorrell a suspect in the Sorrell murders, even though the Commonwealth had sentenced Petitioner to death by contending that Petitioner committed that crime. Opposition to Petitioner's Motion for Discovery at 5.

opposed this request, arguing that Petitioner needed not an investigator, but "disclosure of whatever information was allegedly wrongfully withheld." Brief in Support of Respondent's Opposition to Petitioner's Motion for Appointment of Expert Assistance at 7. On October 19, 1992, the federal district court granted Petitioner's motion for an investigator, and on October 27, the court granted limited discovery, ordering the Commonwealth to identify all persons arrested, indicted or convicted for the Sorrell murders and all persons who interviewed, interrogated, questioned, examined or obtained a statement from Petitioner regarding his alleged involvement in the Sorrell murders. On November 9, 1992, the Commonwealth filed a Motion for Relief from and Objection to Discovery Order. The Commonwealth argued that the question of whether the Commonwealth withheld information of other suspects in the Sorrell case was procedurally defaulted. Brief in Support of Respondent's Motion for Relief from and Objection to Discovery Order at 7-9.

On December 7, 1992, Judge Spencer held a hearing on the Commonwealth's motion for relief from the discovery order. At the hearing, Petitioner's counsel stated that federal discovery had been sought "on the overall due process claim, that indeed has been pursued at all levels." December 7, 1992 Hearing at 21. At the conclusion of the hearing, Judge Spencer stated:

> Well, the Court, in initially allowing the discovery, did not grant the discovery lightly. I took a long, long time and agonized over it. And I thought that I had fairly resolved the matter by granting what in my estimation was limited discovery. Because this is a case that at least created some nagging doubt in my mind, and I think it needed to be resolved. And I still do. . . . Because this just, reading the entire matter, it gave me pause. *I just had a feeling that I didn't like about the government's behavior*[14] or the

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[14] Judge Spencer's "feeling" likely derived both from his extensive experience on the district court bench – having served since 1986 and in

> possibility of the government's behavior in this matter, and it was submitted to my sound discretion and I gave it the best reasoned analysis that I could. And I think discovery is still in order. . . . I do know that if some of these allegations are made out, I would have some problems with it.
>
> So I am going to at least give Mr. Gray that opportunity. *On the Sorrell matter, particularly as it relates to sentencing, it just seems to me it would be very hard to say something like that didn't have an impact, an extremely negative impact.*[15] Well, this is something that I will have to look at another day. But discovery will go on.

Id. at 32-33 (emphasis added).

The Commonwealth responded to the interrogatories via Slezak, who said: "No one has been arrested, indicted or convicted for the Sorrell murders." Answers to Interrogatories at 1-2.[16] The Commonwealth also filed a motion to dismiss, arguing that Petitioner's claim that the Commonwealth had intentionally misled him about the sentencing issue regarding the Sorrell crime was simply a complaint about "inadequate notice," not state misconduct. With the claim thus framed, the Commonwealth argued that the Constitution does not require notice of individual items of sentencing evidence and, if it did, that would be a new rule barred by *Teague v. Lane*, 489 U.S. 288 (1989). Brief in Support of Motion to Dismiss at

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that capacity handled a number of capital habeas corpus cases as well as having presided over a federal capital trial – and his experience as a prosecutor, having served as an assistant United States Attorney for eight years prior to his appointment.

[15] This comment echoes state habeas corpus counsel's plea for an evidentiary hearing in state court. Counsel argued that the Sorrell claim "require[s] further evidence" to "establish the fact that [it] did likely have an effect on the jury" and that "we can establish the likelihood of such an effect." J.A. 115-16.

[16] Slezak did not mention in his answer that he had discussed with the Chesapeake Commonwealth's Attorney seeking an indictment against Timothy Sorrell for the murders.

18-19. Respondent conceded that *Teague* would not bar relief if the Commonwealth had withheld exculpatory evidence, but contended that the *Brady* issue was distinct from the "notice" issue, had not been presented in state court, and was procedurally barred. *Id.* Finally, the Commonwealth argued that "reports to the police that someone else committed the crime are not necessarily material or exculpatory." *Id.* at 21.[17]

On April 1, 1993, the district court granted the Commonwealth's motion to dismiss. Petitioner filed a Motion to Alter or Amend the Judgment, indicating that entry of the Order was a surprise in light of the fact that court-ordered investigation and discovery was ongoing. Motion to Alter or Amend at 7. The court amended its judgment and ordered an evidentiary hearing because "the Court did not address Gray's claim . . . that the admission of evidence during the penalty phase pertaining to the Sorrell murders violated Gray's due process rights (the 'Sorrell claim'). The Court will amend its Final Judgment by finding that such claim was consistently raised in the State courts and is not procedurally defaulted." Memorandum Opinion on Order Denying Judgment at 3-4.

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[17] Counsel for Respondent later argued that "the application of the *Brady* principle in this circumstance to simple testimony of unadjudicated misconduct in the penalty phase of the trial, I'm not sure that has been decided; that *Brady* applies in this context. And we submit that it doesn't and object to the evidence on that ground." Transcript of Evidentiary Hearing at 16. Ferguson testified below regarding his understanding of *Brady*:

> I'm not saying in this case that there might not have been some discussion on Timothy Sorrell. What I am saying is, when this man and when this evidence was put on at the trial of this case, I was convinced, Detective Slezak was convinced, that Coleman Gray was the killer of the Sorrells. That's what I'm telling you . . . I'm not aware of evidence in this case that the other person did commit the crime. And to my knowledge, the man was never charged and, in fact, was cleared by the Chesapeake Police Department. That is not exculpatory evidence.

Id. at 259.

J. Forced Disclosure: The Hearing Conducted Below.

At the outset of the April 21, 1994, hearing, Judge Spencer observed:

> [T]he primary problem that I am concerned about and that I am going to look at closely is the notice that was given, the opportunity for cross-examination regarding the Sorrell murder issues. . . . If the prosecution had exculpatory information that went in another direction and was not turned over, that impacts on any due process violation that would flow from the insufficient notice.

April 21, 1994 Hearing at 3. The Commonwealth promised that "[o]ur evidence that we prepared tomorrow is primarily focused on establishing that Mr. Gray did in fact commit the Sorrell murders, and therefore, Mr. Tucker's testimony was reliable and it was true." *Id.* at 6.[18]

1. Trial Counsel: "Hit on the side of the head"

Lead trial counsel James Moore testified that, at the time of Petitioner's trial, he was a defense attorney with a "country doctor practice of law" in Suffolk, Virginia. Because he had not handled a capital trial, Moore requested that co-counsel be appointed. *Id.* at 21. The trial court appointed Carl Eason, who had never before handled a murder trial. They filed a motion for discovery because they were "looking for assistance" – "we had no investigator so we were looking for anything we could to give us assistance." *Id.* at 30; *see id.* at 27 (we "went down a checklist of what we needed to do in order to try to get on a level playing field with the Suffolk Police Department . . . since there were just two of us, with no investigator").

Moore recounted how Ferguson's breach of promise affected the defense:

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[18] The Commonwealth subsequently failed to offer any credible evidence connecting Petitioner to the Sorrell crime.

> [T]here were two of us without an investigator, and we were engaged in the active defense of the guilt trial, the guilt phase of the trial.
>
> . . . .
>
> I'm exhausted physically and mentally after one day of active trial work. So to go for 5 consecutive days was similar to running a marathon to me.
>
> . . . .
>
> Well, we had found out, and I don't know how we had found it out, maybe Phil Ferguson told me Thursday evening, that he intended to introduce not only what he [had] told me he was going to introduce on Monday morning when he said he was going to introduce statements made by Gray, but he was also going to put in color photographs, bring the investigator and Medical Examiner down to, in essence, try the Sorrell murders.
>
> Q. How did you react to that, sir?
>
> A. It blew me completely away. And is blowing me eight-and-a-half, almost nine years later, and it still blows me away. It is unbelievable. It is incredible.
>
> . . . .
>
> *Coleman Gray had not even been arrested* for the thing, *much less gone to a preliminary hearing, which is for a defense counsel in Suffolk the only place you can do any real investigation*. . . .
>
> . . . .
>
> Q. The morning of December 6th, 1985, were you prepared to defend the Sorrell murders?
>
> A. Absolutely not.
>
> Q. Did you advise the Judge of that?
>
> A. I sure did.

J.A. 134-38.[19] Counsel also testified that the prosecutor never provided him with any evidence "that would suggest that Mr. Gray was not involved in the Sorrell murders." J.A. 145.[20]

Moore addressed Judge Spencer: "Your Honor, it is important for this Court to know . . . what happened was, . . . the similarities between the McClelland murder and the Sorrell murder would be obvious to anyone sitting in a jury box." J.A. 140-41. Moore and Eason did not investigate the Sorrell killing after the guilt verdict because they "didn't have an investigator." J.A. 148.[21]

2. The District Court's Findings of Fact.

a. Findings with Respect to Disinformation.

In his Memorandum Opinion granting habeas corpus relief, Judge Spencer made the following findings of fact, *see Amadeo v. Zant*, 486 U.S. 214 (1988); F.R.Civ. P. 52, about the Commonwealth's disinformation regarding the Sorrell murders:

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[19] Eason affirmed Moore's testimony in its entirety, and made the following telling observation regarding the impact of Ferguson's bait and switch:

> I did not feel prepared to deal with it. . . . We had been hit on the side of the head, and literally were not ready to be able to try to defend a second murder conviction – excuse me, second murder charge with the notice and time frame that we had been given.

J.A. 173-74.

[20] In particular, the Commonwealth provided no information about Timothy Sorrell as a suspect.

[21] Moore and Eason both made clear that Petitioner steadfastly denied any involvement in the Sorrell killings, and also denied saying to others that he had killed the Sorrells. J.A. 153, 179.

- Pre-trial, defense counsel "sought the disclosure of *all* exculpatory evidence." J.A. 338 (emphasis added).
- "At the outset of the [trial], Mr. Moore . . . asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced [sic] at the penalty phase if defendant Gray was found guilty . . . . Mr. Ferguson stated he intended to introduce evidence of *statements* Coleman Gray had made about other crimes he had committed," including the Sorrell murders. J.A. 339.
- "The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area." J.A. 341.
- Despite Ferguson's "unequivocal pledge" only to introduce statements, "Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims; and 3) the medical examiner who investigated the cause of death and the nature and extent of the Sorrell's injuries." J.A. 342.
- At the time of his unequivocal pledge, Ferguson had already contacted Slezak, who knew for "perhaps a month or more, that he would be called to testify in the Gray murder trial." J.A. 342 n.4.
- "Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders." J.A. 343.
- "Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of" evidence other than statements. J.A. 350.
- "Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney

planned to violate his direct promise to only introduce certain 'statements'. . . . The consequences of this surprise could not have been more devastating." J.A. 350.

◆ "The prosecutor's tactics prevented Gray's attorneys from preparing. . . . " J.A. 350.

◆ "Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence." J.A. 348.

◆ "[T]he Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed." J.A. 351.

b. Findings with Respect to Timothy Sorrell as the Suspect in the Sorrell Murders.

Judge Spencer made the following findings of fact with respect to Slezak's knowledge of Timothy Sorrell as a suspect in the Sorrell murders:

> Officer Slezak failed to tell the jury that Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time.[22] At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall

[22] Slezak considered Timothy Sorrell a suspect from the night Lisa and Shanta Sorrell's bodies were found. When Slezak went to Sorrell's home and told him that the bodies had been identified, Sorrell's mother immediately told her son that he did not have to talk to the police. Slezak described Timothy Sorrell's demeanor in subsequent conversations as "highly suspicious" and "defensive." J.A. 185-86 (Testimony of Slezak at April 21, 1994 Hearing).

> on the evening of the murders,[23] ignored the Nixons [Lisa Sorrell's parents] when they saw him at the Greenbrier Mall,[24] made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation,[25] and had a

[23] Lisa and Shanta disappeared during an outing to the Greenbrier Mall. J.A. 285 (Testimony of Brenda Nixon [Lisa Sorrell's mother] at April 21, 1994 Hearing).

[24] On the evening Lisa and Shanta Sorrell disappeared, Timothy Sorrell telephoned Lisa's mother Brenda Nixon three times to ask if Nixon knew where Lisa was: at 6:30 pm, 7:30 pm, and 10:30 pm. Nixon assumed that the three hour lapse between Timothy Sorrell's second and third phone calls was because Timothy was in his regular night school class. She later learned from police that Timothy Sorrell did not attend school that evening. J.A. 286-87, 291-93 (Testimony of Brenda Nixon at April 21, 1994 Hearing).

[25] Slezak admitted that, ultimately, he did not know where Timothy Sorrell was when the murders were committed. J.A. 334 (Testimony of Slezak at April 21, 1994 Hearing). Slezak knew, however, that Petitioner had an alibi for the time of the murders. Slezak theorized that Petitioner committed the murders during his wife Melinda Gray's dinner break from work. Slezak had evidence that Melinda Gray left work at 4:29 pm on the day of the Sorrell murders and returned at 5:30 pm. J.A. 345 n.5. To determine whether Petitioner could have picked up his wife at work, driven to the Greenbrier Mall, abducted the Sorrells, driven them to the crime scene, murdered Lisa Sorrell, spray painted the Sorrells' car, set the car on fire, and returned Melinda Gray to work, all within that hour, Slezak timed the shortest route between Melinda's job and the mall. At 3:00 pm (rather than during rush hour, when the crime occurred), it took Slezak 23 minutes to drive only the first leg of the route from Melinda's work to the mall. J.A. 328-30, 345.

An investigator appointed by the District Court testified that during rush hour it took him 43 minutes to drive from Melinda's work to the Greenbrier Mall, an additional 25 minutes from the mall to where the Sorrells' bodies were found, and 15 minutes more back to Melinda's work. R. 413-17 (Testimony of Alfred Brown at April 21, 1994 Hearing). "Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated." J.A. 345 n.5.

motive to commit the murders.[26] The police also designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed.

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead.[27]

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy.[28]

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[26] In contrast, Slezak had no such indications that Petitioner was involved in the Sorrell murders. In fact, even after Slezak lied to Petitioner that fingerprint samples Petitioner had voluntarily provided for comparison in the Sorrell case matched prints from the Sorrell crime scene, Petitioner steadfastly denied any involvement in the murders. J.A. 230-32 (Testimony of Slezak at April 21, 1994 Hearing).

[27] At the district court hearing, Slezak read a statement from the girlfriend of Timothy Sorrell's friend, in which she recounted how, on the night of the murder, Timothy Sorrell told them that his wife had been shot six times and his daughter was in the trunk of the car as the car burned. J.A. 236-38.

[28] In addition, Slezak testified in district court that he received information from persons who had been at a party at the Sorrell house the day before the murders. These people told Slezak that during the party: a man went into a bedroom with Lisa Sorrell then came out and told Timothy Sorrell that he had just had intercourse with Lisa, and ridiculed Timothy Sorrell (J.A. 215); Timothy Sorrell discussed killing his wife and said that he wanted her killed (J.A. 216); and Timothy Sorrell talked about guns and said that he owned a .32 caliber weapon. J.A. 236-39.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week prior to Lisa's death, a man possessing stolen merchandise came to the Sorrells' [sic] home. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, 'there [i]s no evidence that anybody else did commit this crime except Coleman Gray.' Such an assertion is *patently absurd*.

J.A. 344-45 (citations omitted) (emphasis added).

SUMMARY OF ARGUMENT

The district court found as a fact that the prosecution intentionally misrepresented its intentions regarding presentation of the issue of future dangerousness at Petitioner's capital trial. Despite assuring defense counsel that only inmate statements would be introduced regarding the notorious Sorrell murders, the prosecution intended to ambush the defense with detailed *modus operandi* testimony which Petitioner's trial counsel would be unable meaningfully to meet, explain or rebut. This deceptive conduct violated the hornbook constitutional rule, long established by this Court in a variety of contexts – both civil and criminal – that state action which affirmatively misleads a party regarding determinative trial issues violates the Due Process Clause of the Fourteenth Amendment.

Moreover, the prosecutor exploited this ruse by presenting misleading, apparently incriminating evidence while withholding known, countervailing, exculpatory evidence. The Commonwealth failed to disclose significant evidence indicating that Timothy Sorrell, not Coleman Gray, murdered Lisa and Shanta Sorrell. The suppressed information demonstrated that Timothy Sorrell had motive and opportunity to kill his wife and child, and provided other circumstantial evidence that Timothy Sorrell committed the crime. Thus, after deliberately deceiving defense counsel regarding the scope of the future dangerousness issue, the prosecution exacerbated defense counsel's unpreparedness by concealing information inconsistent with its sentencing theory. This misconduct violated the constitutional mandate of *Brady v. Maryland*.

A decision in Petitioner's favor would not create a new constitutional rule. Precedents at the time Petitioner's conviction became final clearly demonstrate that state action which deliberately misleads a party about the nature of determinative trial issues violates rudimentary notions of due process. Furthermore, even if this case involves a new rule – which it does not – the rule would qualify as a watershed rule of criminal procedure implicit in the concept of ordered liberty, falling within the second exception to non-retroactive application of new rules.

ARGUMENT

I. THE PROSECUTION'S AFFIRMATIVE MISREPRESENTATION REGARDING THE INTENDED SCOPE AND NATURE OF ITS PRESENTATION ON THE FUTURE DANGEROUSNESS SENTENCING ISSUE FLOUTED FUNDAMENTAL REQUIREMENTS OF DUE PROCESS AND THE REQUIREMENT OF RELIABILITY IN CAPITAL SENTENCING.

The undisputed evidence before this Court reveals that the prosecution presented disinformation prior to Petitioner's sentencing, disabling defense counsel. On the first day of trial, defense counsel asked the trial court to order the Commonwealth to disclose the evidence that the prosecution

planned to present at sentencing. Prosecutor Ferguson stated, with respect to the Sorrell crime, that he intended only to offer inmate statements of alleged confessions by Petitioner. According to the prosecution, therefore, the Commonwealth staked this aspect of its case in aggravation exclusively on the credibility of prisoner testimony.

In the hours between conviction and sentencing, however, the Commonwealth's Attorney disclosed his true intentions. The prosecutor revealed that he also planned to present the testimony of the chief investigating officer in the Sorrell murders, M.I. Slezak; the testimony of the medical examiner who performed the autopsies on the Sorrells; and crime scene and autopsy photographs. Ferguson thus shifted the issue to be tried beyond simply the credibility of inmate testimony to the question of whether the *modus operandi* of the McClelland and Sorrell killings was so strikingly similar that the same individual must have committed both. By adducing first-hand investigative and medical details and grisly photographs of the circumstances of the Sorrell crime, Ferguson left the defense no option but to try to demonstrate that someone other than Petitioner had committed this purported signature crime – an area of proof that the prosecution's trickery had lulled defense counsel into failing to prepare.

Defense counsel objected to the prosecution's surprise evidence, averring that because of Ferguson's pledge that he would present only a "jailhouse snitch" version of the Sorrell offenses, counsel had refrained from investigating the circumstances, *modus operandi*, and other crucial details of those killings and were wholly unprepared to defend Petitioner against the Commonwealth's *modus operandi* case. Despite these protestations (and despite the prosecutor's prior open court assurances), the trial judge allowed the Commonwealth to proceed. The prosecutor then spread before the jury the physical minutiae and the *modus operandi* of the Sorrell killings in extensive, graphic detail. This evidence formed the

centerpiece of the prosecutor's submission that Coleman Gray, as a repeat killer, posed a future danger.[29]

A. The Due Process Clause of the Fourteenth Amendment forbids a prosecutor from deliberately misleading a capital defendant about the issues to be presented at his capital sentencing hearing so as to deprive him of any meaningful opportunity to rebut or explain the state's evidence in aggravation.

The narrow, central question presented in this case is whether due process permits a prosecutor to misrepresent the nature of the state's intended case in aggravation, with the purpose and effect of denying the defendant the opportunity to prepare and contest the critical issues at a capital sentencing hearing. The answer to that question was plainly established in this Court's case law long before Mr. Gray's trial – indeed, long before the Court's well-known opinion in *In re Gault*, 387 U.S. 1 (1967), recapitulated the components of the

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[29] The Sorrell killings were the determinative aspect of the Commonwealth's evidence in aggravation on the future dangerousness issue. In his argument to the trial court urging the judge to admit the Sorrell evidence – despite his prior contrary pledge – Prosecutor Ferguson said the additional evidence he intended to present was critical because it "goes to the whole thrust of what the Commonwealth must prove in a sentencing hearing." J.A. 26-27. In addition, during closing argument at sentencing, Ferguson repeatedly stressed the facts of the Sorrell crime and maintained that Petitioner had committed "murder after murder" and that the cases involved several "brutal, systematic execution-style crimes." J.A. 53, 52. On direct appeal to the Virginia Supreme Court, the Commonwealth conceded that Tucker's testimony "standing alone, may not have been sufficient to convince the jury that the defendant committed the Sorrell murders." Brief of Appellee at 13-14. The Commonwealth also stressed that the evidence regarding the Sorrell murders was "highly probative of" and "particularly indicative of" Gray's future dangerousness. *Id.* at 14, 60. The Virginia Supreme Court concluded that the evidence indicated that the "Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murders." J.A. 98.

"notice which would be deemed constitutionally adequate in a civil or criminal proceeding," *id.* at 33, namely:

> timely notice, in advance of the hearing, of the specific issues that . . . [a party] must meet

id. at 34,

> so that a reasonable opportunity to prepare will be afforded.

Id. at 33; *see, e.g., Roller v. Holly*, 176 U.S. 398, 409-10 (1900); *Warner v. Godfrey*, 186 U.S. 365, 377 (1902); *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 208 (1911); *United States v. Abilene & S. Ry. Co.*, 264 U.S. 274, 289 (1924); *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 234-35, 238 (1938).

In civil and criminal cases alike, this Court has repeatedly held that " '[t]he fundamental requisite of due process of law is the opportunity to be heard.' " *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Odean*, 234 U.S. 385, 394 (1914)); *see, e.g., Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876); *In re Oliver*, 333 U.S. 257, 273, 278 (1948); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956); *Dunn v. United States*, 442 U.S. 100, 106 (1979). "[T]he right to a hearing embraces . . . a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938); *see also, e.g., Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991) (in a "variety of contexts, [this Court's] cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn"); *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) (dictum) ("[a] party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the [decision maker] relies for decision so that he may rebut it"); *Goldberg v. Kelly*, 397 U.S. at 267-68; *In re Gault*, 387 U.S. at 34 ("one of the purposes of notice is to clarify the issues to be considered"); *id.* at 17 (describing the commonplace requirement of "notice of issues" in civil proceedings); *Cole v. Arkansas*, 333

U.S. 196, 201 (1948) (notice of the specific charge "and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal"); *Fed. Trade Comm'n v. Nat'l Lead Co.*, 352 U.S. 419, 427 (1957).

It is, in short, the demonstrable and unmistakable hornbook law of due process that any litigant in any legal proceeding "must be given such notice of the issues involved in the hearing as will reasonably enable him to prepare his case," Bernard Schwartz, *Administrative Law* 283 (2d ed. 1984); *see, e.g.*, Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1280-81 (1975). This Court has been protecting litigants against manipulative evasions of that hornbook rule for more than a century. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 521 (1916); *Smith v. Woolfolk*, 115 U.S. 143, 148-49 (1885). This is hardly surprising; for, if " 'process which is a mere gesture is not due process,' " *Covey*, 351 U.S. at 146 (quoting *Mullane*, 339 U.S. at 314-15), then process which is a deceptive gesture is not even debatably within the bounds of constitutional or prosecutorial propriety.

Therefore, unless a reasonable lawyer could suppose that Mr. Gray, at the sentencing stage of his capital trial, was not entitled to the most basic procedural protections vouchsafed by the federal Constitution to civil and non-capital criminal litigants (and even to administrative litigants for over half a century), Mr. Gray's constitutional rights were palpably – and, as the district court below found, quite deliberately – violated by the prosecutor's ruse. *Could* a reasonable prosecutor have supposed that these protections were uniquely inapplicable to death-sentencing proceedings? Certainly not after *Gardner v. Florida*, 430 U.S. 349 (1977), squarely held to the contrary. For *Gardner* both established that "the [capital] sentencing process . . . must satisfy the requirements of the Due Process Clause," *id.* at 358; *see id.* at 364, 365, and announced specifically that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' " *Simmons v. South Carolina*, 114 S. Ct. 2187, 2192 (quoting *Gardner*, 430

U.S. at 362); *accord Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) ("[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"). *Gardner* involved the use of "secret information," *Lankford*, 500 U.S. at 126, contained in an undisclosed presentence report, which was reviewed only by the trial judge who under Florida law acted as the ultimate sentencer. 430 U.S. at 353-54. However, state action that injects such information into the capital sentencing process violates the fundamental requirement of fair notice of the issues to be tried not because the evidence is secret but because it has the "practical effect of concealing from the [defense] the principal *issue* to be decided at the hearing." *Lankford*, 500 U.S. at 126 (emphasis added).

Simmons and *Skipper v. South Carolina*, 476 U.S. 1 (1986), illustrate additional applications of the bedrock requirement of a fair opportunity to be heard on determinative issues. In both cases, the state presented its capital sentencing evidence in open court but used state evidentiary rules to prevent the defendants from meaningfully responding to the "future dangerousness" issue. In *Skipper*, a state evidentiary rule precluded capital defendants from offering evidence regarding their future adaptability to prison life. The prosecutor exploited this rule by simultaneously arguing to the sentencer that the defendant posed a danger to other inmates if sentenced to life imprisonment (rather than the death penalty) and successfully excluding evidence of the defendant's good behavior in jail. Because the state rule deprived Skipper of an adequate opportunity to address the issue on which the state sought his death, this Court concluded that due process, as embodied in *Gardner*, required resentencing. *Skipper*, 476 U.S. at 5 n.1.

Likewise, *Simmons* involved a trial court decision forbidding capital defendant Simmons to meet the state's claim that he posed a future danger if sentenced to life imprisonment (rather than the death penalty) by developing and introducing accurate information regarding his parole ineligibility. *Simmons*, 114 S. Ct. at 2193. Citing both *Gardner* and *Skipper*, this Court concluded that the procedure violated "elementary due process principles" when the "State raised the specter of

petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole." *Id.* at 2194; *see also id.* at 2198.

Yet another way in which the state may unconstitutionally keep a defendant from identifying the legal issues determinative of his rights, and thus deprive him of a meaningful opportunity to address the issues, is simply by misinforming him. *Lankford* illustrates this Due Process notion. Before trial, the *Lankford* prosecutor disavowed any intention to seek the death penalty. During the sentencing hearing, therefore, defense counsel did not address critical capital sentencing issues – the presence, absence and relevance of mitigating and aggravating circumstances. *Lankford*, 500 U.S. at 115. Nevertheless, the sentencing court imposed the death penalty. Reasoning that "fair notice" of the issue to be tried is "the bedrock of any constitutionally fair procedure," *id.* at 121, this Court held that "inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made." *Id.* at 124.[30]

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[30] Lower federal courts have reached the same conclusion. In *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), *aff'd on other grounds*, 451 U.S. 454 (1981), the state presented testimony about a capital defendant's future dangerousness, even though defense counsel had not been apprised that the mental health evaluation concerned that critical sentencing issue and the psychiatrist's name was not on the state's witness list. The Fifth Circuit reversed, finding that:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, *Gardner v. Florida*, 430 U.S. at 357, 97 S. Ct. at 1204, and in foreclosing 'that debate between adversaries [which] is often essential to the truth-seeking function of trials,' *id.* at 360, 97 S. Ct. at 1206. Smith's attorneys were manifestly surprised by Dr. Grigson's testimony. . . . The consequences of this surprise were devastating. Thus the trial judge's informality and the prosecution's tactics combined to give Smith's attorneys no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it in any significant way. Surprise in this case impaired 'the interest in reliability,' *id.* at 359, 97 S. Ct. 1197 as much as secrecy did in *Gardner*.

Smith, 602 F.2d at 699-701 (footnotes omitted); *accord Gholson v. Estelle*, 675 F.2d 734, 738 (5th Cir. 1982) ("[t]he defect is that defendants – at the punishment phase of their trials – were confronted and surprised by the doctor's testimony" which "inhibited, if not denied" the defendants' "ability to question or challenge the veracity of the very testimony that served as the groundwork for their being condemned to die"); *Blackmon v. Scott*, 22 F.3d 560, 566 (5th Cir.), *cert. denied*, 115 S. Ct. 671 (1994) (based on *Gardner*, remanding for evidentiary hearing on claim that defendant was unfairly surprised by manner in which state introduced evidence regarding unrelated, unadjudicated double homicide at capital sentencing); *Williamson v. Reynolds*, 904 F. Supp. 1529, 1573 (E.D. Okla. 1995) (one day notice of state's intent to use evidence of unadjudicated crimes at capital sentencing left defendant "unable to defend against this highly prejudicial testimony, rendering the trial fundamentally unfair in violation of the Due Process Clause").

In other settings, this Court also has maintained consistently that due process prevents state actors from providing "a false sense of security" that particular issues or conduct will not mature into legal disabilities, only thereafter to saddle the duped party with exactly those disabilities. For example, in disbarment proceedings in *In re Ruffalo*, 390 U.S. 544 (1968), the bar commission added further charges of misconduct after both the attorney and a former employee testified. When they testified, the attorney had no notice that the bar commission would add hiring this employee as a count against him; the original charge involved soliciting clients through the employee. Even though the commission allowed the attorney to respond to the belated charge, this Court found a due process violation because the attorney "may have been lulled 'into a false sense of security' that he could rebut [the original] charges by proof that [the employee] was his investigator rather than a solicitor of clients." *Id.* at 551 n.4 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)).

This Court affirmed the same basic due process principle in *Raley v. Ohio*, 360 U.S. 423 (1959), where witnesses before the Ohio Un-American Activities Commission were convicted of contempt for refusing to answer questions. The Commission promised the witnesses that they could assert a state constitutional privilege against self-incrimination during their testimony. They were not informed that a state statute forbade invocation of the privilege in their circumstances and, thus, their refusal to answer questions was criminal. *Id.* at 425. While acknowledging that the Commission did not intend to deceive the witnesses, the Court nevertheless concluded that the assurances given to them constituted "active misleading," and that due process forbade later retraction of those assurances. *Id.* at 438. "[C]onvicting a citizen for exercising a privilege which the State had clearly told him was available to him" would "sanction the most indefensible sort of entrapment." *Id.*; *see also Johnson v. United States*, 318 U.S. 189, 197 (1943) ("An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. . . . Elementary fairness requires that an accused should not be misled on that score."); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (due process violated when prosecutor commented on defendant's decision not to talk to police at time of arrest because "assurance that silence will carry no penalty . . . is implicit to any person who receives [*Miranda*] warnings").

Ruffalo, *Raley*, *Bouie* and similar decisions involving *accidental* misleading as to the determinative issues flow from an even older and more fundamental doctrine: that the due process clause does not tolerate state action *intentionally* designed to mislead opposing counsel or the factfinder regarding determinative trial issues. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), for example, this Court stated that "deliberate deception of court and jury by the presentation of testimony known [by the prosecution] to be perjured . . . is inconsistent with rudimentary demands of justice." What made the state action in *Mooney* so offensive was the possibility that the state premised its case on testimony that it knew was false, yet kept

defense counsel from learning it was false and thus demonstrating its unreliability. *Accord Pyle v. Kansas*, 317 U.S. 213 (1942) (deliberate suppression of evidence favorable to the accused and knowing use of perjured testimony violated due process); *Alcorta v. Texas*, 355 U.S. 28 (1957) (due process was violated where prosecutor knowingly elicited false testimony providing sole basis for death-eligibility); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (there "has been no deviation from [the] established principle" that due process "cannot tolerate a state criminal conviction obtained by the knowing use of false evidence"). Similarly, in *Napue v. Illinois*, 360 U.S. 264 (1959), a key prosecution witness testified that he was receiving no consideration from the state in exchange for his testimony when, in fact, both he and the prosecutor knew this was not true. This Court recognized that "implicit in the concept of ordered liberty" is the due process requirement that the state not premise its case on the veracity of a particular witness who testifies falsely, while thwarting the defense's effort to challenge the witness' credibility. 360 U.S. at 269; *see also United States v. Agurs*, 427 U.S. 97, 104 (1976) (the prosecution's knowing use of false testimony involves "a corruption of the truth-seeking function of the trial process").

The due process rule that governs Petitioner's case, therefore, is as clear and straightforward as it is well established: *the state may not employ deception to keep an opposing party from developing its case on an issue that the state has made determinative of the outcome.* The robustness of this rule is illustrated by the many contexts in which the Court has applied it – civil as well as criminal (not to mention capital) – including findings of Due Process violations where the state has prevented meaningful presentation on a determinative issue by withholding notice of that issue or misinforming a party that it was not an issue in the particular case.

B. The prosecutor's disinformation regarding his plans to try the Sorrell murders at Coleman Gray's penalty trial denied Petitioner fair notice and an opportunity to be heard on determinative sentencing issues.

The prosecutor's actions in this case transgressed the bedrock due process ban on state action which prevents a defendant from developing his case on determinative trial issues. Ferguson actively misled defense counsel regarding his sentencing phase intentions and then ambushed them with a detailed – but very misleading – presentation on future dangerousness. These "prosecutor[] tactics" were fueled by an affirmative "decision to withhold this information and to surprise" defense counsel. J.A. 348, 350. Ferguson had pledged not to do exactly what he previously "had arranged" to do. J.A. 342.

The Commonwealth's sole argument in the court below was that the Commonwealth satisfied due process in this case by giving defense counsel the formal right to cross-examine the Commonwealth's witnesses. This Court, however, requires that a defendant have a *meaningful* opportunity to contest issues determinative of the state's case. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (due process entitles defendant to a " 'meaningful opportunity to present a complete defense' ") (citation omitted); *Simmons*, 114 S. Ct. at 2199 (Ginsburg, J., concurring) (capital defendant must have "full and fair opportunity" to rebut state's case in aggravation of punishment). To violate due process, state efforts to obscure determinative issues or otherwise prevent a response need not be total, but only effective – as they were in Petitioner's case. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 317-18 (1974); *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

In Petitioner's case, as in *Gardner*, *Skipper* and *Lankford*, had defense counsel received adequate notice regarding the Commonwealth's intentions, "presumably [they] would have advanced arguments that addressed these circumstances." *Lankford*, 500 U.S. at 122. Had the Commonwealth not deceived defense counsel into believing that the critical sentencing issue was whether a jailhouse informant's convenient

account of Petitioner's alleged confession to a collateral crime was believable, defense counsel would have prepared to meet the real issue: that the details of the Sorrell killings so closely matched the *modus operandi* in the McClelland case that Petitioner was guilty of both crimes. Indeed, in Petitioner's case, far worse than in *Gardner*, *Skipper*, or *Lankford*, defense counsel were "*ambushed*." J.A. 351. From a due process standpoint, the Commonwealth's actions in Petitioner's case were more offensive than in *Gardner*, *Skipper*, or *Lankford*. This case does not involve mere prosecutorial negligence or the application of established, but constitutionally erroneous, state rules of evidence. Rather, these facts reveal intentional misconduct – disinformation. In *Gardner*, the state at least advanced some legitimate interest in keeping the information secret. *See Gardner*, 430 U.S. at 358-60. Here, absolutely no *bona fide* state interest justifies the Commonwealth's conscious subterfuge.

Little did defense counsel know that they had been "sucker punched" into foregoing an investigation into the details of the Sorrell crime – details which, in reality, were not nearly so harmful to Gray as the Commonwealth was able to claim. The Commonwealth's false assurances effectively paralyzed the defense. It is commonplace in defending a criminal prosecution, as in any other litigation situation, that selectivity is the essence of presenting one's case to a judge or jury.[31] Told to expect that at the penalty phase the Commonwealth's case would consist exclusively of evidence that Petitioner allegedly had admitted the Sorrell killings – with the only possible source of the admissions being bought-and-paid-for inmate testimony – defense counsel reasonably judged that

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[31] *See, e.g., Jones v. Barnes*, 463 U.S. 745, 752 (1983) (recognizing that a "discriminating advocate" carefully selects the issues he will present and how he will present them); *Burger v. Kemp*, 483 U.S. 775, 792 (1987) (holding that "an experienced trial lawyer" properly decided not to present certain types of evidence at the sentencing phase "that might be literally fatal"); Anthony Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases*, 243 [§277] (5th ed. 1989).

they should attack the Commonwealth's case by attacking the credibility of its witnesses.

No capable lawyer, in light of what the prosecutor promised to (and not to) prove, would have prepared to present independent evidence about the factual circumstances (including gruesome details) and the identity of the perpetrator (which would have brought in additional gruesome details) of the Sorrell killings – the most notorious and inflammatory case in the history of Tidewater, Virginia. However, given the issue that the prosecutor actually presented – the investigating detective's and medical examiner's descriptions of the crimes, complete with *modus operandi* and gruesome photos – it would have been critical for Petitioner's lawyers to contest guilt by, for example, proving that someone else – say, Timothy Sorrell – was the culprit. But after the trap was sprung, it was too late for independent defense preparation on the issue. The prosecutor's bait and switch enabled the Commonwealth to present a misleading case that made Petitioner appear to be the culprit and to escape the rebuttal of that case by contrary evidence which the prosecutor knew existed, but continued to conceal.

There is no alternative: long-cherished principles of Due Process forbid the prosecution from providing disinformation regarding the issues upon which it intends to rely at the sentencing phase of a capital trial, thereby preventing the defense from engaging in timely investigation, preparation, and correction, rebuttal or explanation. Because the Commonwealth's action flouted the "bedrock of any constitutionally fair procedure," *Lankford*, 500 U.S. at 121, the district court properly granted the writ of habeas corpus.

II. THE PROSECUTOR'S WITHHOLDING OF EXCULPATORY EVIDENCE TENDING TO SHOW THAT COLEMAN GRAY DID NOT COMMIT THE SORRELL MURDERS VIOLATED THE RULE OF *BRADY V. MARYLAND*.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "suppression of evidence favorable to an accused

upon request violates due process where the evidence is material either to guilt or punishment. . . . "[32] *See also Kyles v. Whitley*, 115 S. Ct. 1555 (1995). Favorable evidence includes that which is directly exculpatory or items which can be used for impeachment purposes. *See Giglio v. United States*, 405 U.S. 150 (1972) (nondisclosure of evidence affecting witnesses' credibility falls within ambit of *Brady*); *Kyles*, 115 S. Ct. at 1565. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

In *Kyles*, this Court discussed the materiality standard, emphasizing that the adjective "reasonable" in the term "reasonable probability" is important. 115 S. Ct. at 1566. The Court noted: "[T]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*[33] Furthermore, it does not matter if the undisclosed evidence was in the hands of the police rather than the prosecution. *Id.* at 1567-68. Rather, *Brady*'s duty to disclose

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[32] In capital cases, therefore, evidence which would be favorable to the accused at the sentencing phase of the trial – e.g., evidence which might arguably be mitigating, evidence which might establish residual doubt or impeach state's witnesses, or any other evidence which might lead a reasonable juror to vote for life imprisonment rather than the death penalty – must be disclosed pursuant to *Brady* and its progeny. *Brady*, 373 U.S. at 87.

[33] The *Kyles* Court stated:

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant).

Kyles, 115 S. Ct. at 1566.

applies to **all** members of the "prosecution team," including **all** law enforcement officers and law enforcement agencies which were in any way involved in the case. *Id.* at 1567 (prosecution has "the duty to learn of favorable evidence known to others acting on the government's behalf in the case, including the police").[34]

Substantial, undisclosed information regarding the probable guilt of another suspect is clearly exculpatory, and virtually always material. Indeed, *Brady* involved an undisclosed statement by a co-defendant that the co-defendant killed the victim. *Brady*, 373 U.S. at 84. Brady had admitted his involvement in the crime, but adamantly maintained that he was not the killer. *Kyles* also involved undisclosed evidence of another person's guilt. The *Kyles* Court emphasized that the improperly withheld information "could have further underscored the possibility that [another person] was [the] actual killer." *Kyles*, 115 S. Ct. at 1569 n.13; *see also id.* at 1572 (with the withheld information, defense could have "attacked the reliability of the investigation in failing to even consider [another person's] guilt"). In the lower courts, cases are legion finding *Brady* violations where the state failed to disclose significant evidence pointing to other suspects. *See, e.g., Banks v. Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995); *Smith v. Sec'y of New Mexico Dep't of Corrections*, 50 F.3d 801 (10th Cir. 1995); *Bowen v. Maynard*, 799 F.2d 593 (10th Cir.), *cert. denied*, 479 U.S. 692 (1986); *Sellers v. Estelle*, 651 F.2d 1074 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982); *Cannon v. Alabama*, 558 F.2d 1211 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Patton v. State*, 530 So.2d 886 (Ala. Crim. App. 1988); *State v. Johnston*, 529 N.E.2d 898 (Ohio 1988); *State v. Munson*, 886 P.2d 999 (Ok. Crim. App. 1994).

The Commonwealth, in addition to affirmatively misleading defense counsel regarding the scope of its sentencing phase presentation, concealed favorable, material information which would have undermined the issue that the Commonwealth *did*

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[34] *Brady* and its progeny also make clear that the good faith – or bad faith – of the prosecution is irrelevant. *Brady*, 373 U.S. at 87.

present. Timothy Sorrell was initially the primary suspect in the murder of his wife and daughter. Law enforcement listed Timothy Sorrell as the sole suspect on evidence sent to crime labs in the Sorrell case. J.A. 192-95, 344. Indeed, Officer Slezak – a key witness in the Commonwealth's effort to demonstrate that Petitioner had killed the Sorrells – had discussed with the Chesapeake Commonwealth's Attorney seeking an indictment against Timothy Sorrell for the murders. J.A. 200-01, 345.

The discussion was prompted by the following:

- Timothy Sorrell admitted that he was at the mall where the victims were believed abducted on the night of the murders. J.A. 199, 344.
- When his wife's parents saw him at the mall that night, he ignored them. J.A. 199, 344.
- On the night Lisa and Shanta Sorrell disappeared, five days before their bodies were found, Timothy Sorrell told a friend that Lisa and Shanta were dead. J.A. 213-14, 344.
- When Officer Slezak told Timothy Sorrell that his wife and daughter had been found dead, Sorrell's unusual reaction caused Slezak to consider him a suspect immediately. Slezak described Timothy Sorrell's demeanor in subsequent conversations as "suspicious" and "defensive." J.A. 185-86, 344.
- Timothy Sorrell changed his alibi for the time of the murders several times. Slezak ultimately said that he did not know where Timothy Sorrell was at the time of the murders. J.A. 187, 334, 344.
- Timothy Sorrell had several motives to kill his wife: two weeks before the murders, an insurance policy was issued on her life naming him as beneficiary;[35] people at a party at the Sorrells the night before the murders told police that another man had gone into a bedroom with Lisa Sorrell and then ridiculed Timothy Sorrell by telling him that he had just had

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[35] Six days before Petitioner's trial, Lisa Sorrell's parents filed a lawsuit seeking to prevent Timothy Sorrell from collecting the insurance proceeds, on the grounds that he had murdered Lisa Sorrell.

intercourse with his wife; and Lisa Sorrell was apparently unhappy with Timothy Sorrell's alleged involvement in a criminal enterprise. J.A. 188, 215, 344-45. *See also* Statement of the Case, sub-section J.2.b., *supra*.

The prosecution did not disclose any of this evidence which might have led reasonable jurors to believe that Timothy Sorrell, not Coleman Gray, killed Lisa and Shanta Sorrell.[36] Had the Commonwealth disclosed this evidence, defense counsel would have completely discredited the prosecution's assertion that Petitioner committed the Sorrell murders, thereby undermining *all* of Tucker's testimony at both guilt/innocence and sentencing. Without this critical evidence, however, the defense was completely unable to counter what appeared to be a strong circumstantial case that Petitioner was guilty of the notorious, uncharged crime.

III. THE DISTRICT COURT DID NOT CREATE A NEW CONSTITUTIONAL RULE IN DETERMINING THAT THE COMMONWEALTH'S DELIBERATE CONCEALMENT OF ITS INTENTION TO TRY THE SORRELL MURDERS AT COLEMAN GRAY'S PENALTY TRIAL VIOLATED DUE PROCESS.

A. This case does not involve a new rule of criminal procedure.

Teague v. Lane, 489 U.S. 288 (1989), established that a new constitutional rule will not be applied or announced in federal habeas corpus cases unless it falls within one of two exceptions. For *Teague* purposes, a rule is new if " 'the result was not dictated by precedent existing at the time the defendant's conviction became final.' " *Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994) (quoting *Teague*, 489 U.S. at 301). The inquiry is whether " 'a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he]

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[36] The prosecutor promised pre-trial fully to comply with *Brady*. R. 73.

seeks was required by the Constitution.' " *Id.* (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

"Surveying the legal landscape" as it existed in October 1987, when Petitioner's conviction and sentence became final, *see Graham v. Collins*, 506 U.S. 461, 468 (1993), reveals that Petitioner's claim was clearly "dictated by precedent." *Butler v. McKellar*, 494 U.S. 407, 412 (1990). As the discussion of Petitioner's claims at pages 30-37, *supra*, indicates, this case is grounded in due process principles established long before Petitioner's conviction became final in 1987. The constitutional rules forbidding affirmative misleading and intentional misrepresentation regarding determinative trial issues, and requiring that capital defendants have a meaningful opportunity to contest, rebut or explain the state's case in aggravation of punishment, were established decades earlier. Furthermore, *Gardner v. Florida*, 430 U.S. 349, established the applicability of due process rules to capital sentencing proceedings in 1977, ten years before Petitioner's conviction became final. *Skipper v. South Carolina*, 476 U.S. 1, applied *Gardner*'s due process analysis to facts not involving "secret information" in 1986.

Deciding the case in petitioner's favor would not extend the reasoning of any of this Court's prior cases and certainly would not overrule or even call into question the validity of any precedent. *See Graham*, *supra*, 506 U.S. at 467 ("it is more difficult to determine whether we announce a new rule when a decision extends the reasoning of our prior cases") (quoting *Saffle v. Parks*). Rather, just as in *Stringer v. Black*, 503 U.S. 222, 237 (1992), the precedents existing at the time petitioner's conviction became final on direct review "yield a well-settled principle:" the state, including in the sentencing phase of a capital trial, may not engage in conduct which affirmatively misleads opposing counsel in such a way so as to deny the defendant a meaningful opportunity to develop his response to, to explain, or to rebut the state's presentation on an issue the state itself has made determinative of the outcome. Although the Virginia Supreme Court held to the contrary, the "short answer" to the state court's decision is that it "made a serious

mistake." *Id.* The new rule principle may "validate[ ] reasonable, good-faith interpretations of existing precedents made by state courts," *Butler*, 494 U.S. at 414, but it does not condone decisions that are both objectively unreasonable and inconsistent in all respects with a long-established and conclusive rule of law.

The Commonwealth cannot point to any decisions that condone the deliberately diversionary misrepresentations in which it engaged at Petitioner's trial; there are no cases from this Court or any other court approving such misconduct. By claiming that its misconduct is immune to correction because it is distinct from that in such cases as *Gardner* and *Skipper*, the Commonwealth seeks a windfall based on the prosecutor's extraordinarily inappropriate behavior in this case. The only difference between the earlier cases, which involved intentional misconduct sanctioned by state law, and this case, which involves deliberate misdeeds initiated by the prosecutor as an ambush tactic, is that earlier cases involved less outrageous and much less self-evidently unconstitutional behavior.

The Fourth Circuit determined that this case involved a new rule because it misunderstood Petitioner's claim. *See Gray v. Thompson*, 58 F.3d at 64 ("the precise rule petitioner seeks is a constitutional entitlement to *adequate advance* notice of *particular* items of evidence") (emphasis in original). Petitioner has never asserted that the Commonwealth bears an affirmative duty to provide advance disclosure of inculpatory evidence.[37] From trial on, Petitioner has relied on the long-established rule that the prosecution may not deprive the defense of an opportunity to address the issues the state itself has made decisive of the outcome, especially when the state does so through trickery and deceit.

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[37] A sampling of Petitioner's arguments in the courts below demonstrates that Petitioner never claimed a constitutional right to advance discovery of the Commonwealth's evidence. *See, e.g.*, Opening Brief for Petitioner-Appellee at 25-30 (filed in circuit court); Petitioner's Memorandum in Response to Motion to Dismiss at 6-7, 13 (filed in district court).

B. This case falls within the exception to non-retroactivity for watershed rules of criminal procedure.

Even if Petitioner sought a new rule, the rule would fall under *Teague*'s second exception for " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *see also Teague*, 489 U.S. at 311-12. A due process rule that the state cannot deliberately conceal and affirmatively misrepresent its intentions regarding the nature and scope of determinative trial issues, especially in a capital case, is clearly among the "small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478.

In *Lankford*, this Court recognized "the importance that we attach to fair notice as the bedrock of any constitutionally fair procedure." 500 U.S. at 121. Petitioner invokes a rule mandated by long-recognized principles of fundamental fairness critical to accuracy in capital sentencing determinations. The rule is a necessary component of "the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To condone the Commonwealth's conduct in Petitioner's case would moot the most fundamental promises of due process and encourage prosecutors to run roughshod over the constitutional rights of the accused.

CONCLUSION

For all these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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